No. 16-1730

In The

United States Court of Appeals

For The Fourth Circuit

Jesse Solomon

Plaintiff/Appellee,

v.

Bert Bell/Pete Rozelle NFL Player Retirement Plan, and NFL Player Supplemental Disability Plan,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

BRIEF OF APPELLANTS The BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, and the NFL PLAYER SUPPLEMENTAL DISABILITY PLAN

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LOCAL RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, counsel of record for Defendants-Appellants The Bert Bell/Pete Rozelle NFL Player Retirement Plan and the NFL Player Supplemental Disability Plan hereby certify the following:

(1) Neither party is a publicly held corporation or other publicly held entity.

(2) Neither party has any parent corporation(s).

(3) No publicly held corporation or other publicly held entity owns 10% or more of the stock of either party.

(4) No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation.

(5) Neither party is a trade association.

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JURISDICTIONAL STATEMENT

Jesse Solomon brought suit under section 502(a)(1)(B) of ERISA, 29 U.S.C. section 1132(a)(1)(B), to overturn an ERISA plan administrator's discretionary decision that he was entitled to "Inactive" total and permanent disability benefits rather than a higher-paying category of benefits called "Football Degenerative." The United States District Court for the District of Maryland had federal question jurisdiction over the action pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[1] The district court entered final judgment on June 21, 2016.[2] The Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Plan") and NFL Player Supplemental Disability Plan ("Disability Plan") filed a timely notice of appeal on June 22, 2016.[3] This Court has jurisdiction over the appeal under 28 U.S.C. section 1291.

STATEMENT OF ISSUES

(1) Did the district court err when it held that the Plan administrator, the Retirement Board ("Board"), was bound by Plan terms to accept a retroactive, disability onset date selected by the Social Security Administration when

[1] *See* 28 U.S.C. § 1331 (federal question jurisdiction); 29 U.S.C. § 1132(a)(1)(B) (participant may bring an action "to recover benefits due to him under the terms of his plan"); 29 U.S.C. § 1132(e) (providing federal court jurisdiction over actions under ERISA section 1132(a)(1)(B)).

[2] 6/21/2016 Amended Jgmt. Order (JA094).

[3] 6/22/2016 Notice of Appeal (JA096).

classifying total and permanent disability benefits?

(2) Did the district court err when it held that the Board abused its discretion by determining that Solomon was not totally and permanently disabled prior to March 31, 2010?

INTRODUCTION

This case is about the integrity of ERISA's abuse-of-discretion standard of review. Is it a sham, a flimsy cover that may be easily ripped aside and trampled on when a court prefers a different result? Or is it a cornerstone of ERISA jurisprudence, necessary to protect "important values," including "the plan administrator's greater experience and familiarity with plan terms and provisions," "the enhanced prospects of achieving consistent application of those terms and provisions," and "the importance of ensuring that funds which are not unlimited go to those who, according to the terms of the plan, are truly deserving."[4]

The Plan was created and is maintained by voluntary collective bargaining agreements. It is undisputed that the Plan gives the Board full and absolute discretion to interpret the Plan and decide claims for benefits. It is undisputed that the Plan's Board, with three voting members appointed by the NFL Players Association and three voting members appointed by the NFL, all of whom serve

[4] *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 323 (4th Cir. 2008).

without pay and are distinguished former Players or NFL representatives, is entitled to the highest deference permitted by ERISA. It is undisputed, as a matter of law, that the Board has no conflict of interest that might suggest a lesser standard of review. It is undisputed that each of the Board's decisions in this case was unanimous; that all three of the former Players serving on the Board joined in each of those decisions.

Although Solomon will unleash a firestorm of misdirection concerning chronic traumatic encephalopathy ("CTE"), it is also plainly true that the precise cause of Solomon's disability is basically irrelevant. It does not affect the amount of his benefits. This case is about ***when*** Solomon became totally and permanently disabled. More precisely, the key issue is whether the Board abused its discretion when it determined that Solomon was not totally and permanently disabled prior to March 31, 2010. That is it. Solomon will improperly attempt to link this case to the NFL concussion litigation and to other cases involving head trauma, and will spin an elaborate web of conspiracy to deny benefits. It is all obvious nonsense.

Solomon retired from professional football at the end of the 1994 season. He first applied for Plan total and disability ("T&P") benefits in March 2009. After a full administrative process, during which both of the Plan's neutral physicians to examine Solomon opined that he was not totally and permanently disabled, his claim was finally denied in November 2009. Solomon never

challenged that decision.

In December 2010, Solomon filed a second application for Plan T&P benefits. While that application was pending, on June 21, 2011, Solomon was awarded disability benefits by the Social Security Administration ("SSA"). The Plan generously provides, with one exception not here relevant, that an eligible Player who is awarded SSA disability benefits automatically qualifies for T&P benefits from the Plan. Accordingly, Solomon was awarded Plan T&P benefits effective October 1, 2010, two months prior to the date of his application.

The Plan has four categories of T&P benefits; two are relevant here, Football Degenerative and Inactive. To determine which applied, the Board had to decide whether Solomon was totally and permanently disabled within 15 years after the end of his last NFL season. That key date is March 31, 2010. After a full review of all the facts and circumstances, including reports from the Plan's doctors and from Solomon's doctors, the Board concluded that Solomon was not totally and permanently disabled prior to March 31, 2010.

Solomon appealed. He argued that the Plan was bound by the SSA finding that he was totally and permanently disabled as of October 29, 2008. He also argued that the Board should accept his first, 2009 application as proof of total and permanent disability prior to March 31, 2010.

The Board, whose members are drawn from the ranks of both NFL Players

and NFL executives, and whose primary goal is to provide retirement and disability benefits to eligible football players, again reviewed all the evidence. The Board noted that, under the terms of the Plan, its prior finding that Solomon was not totally and permanently disabled as of November 2009, just four months before the 15-year cut-off, was binding. The Board noted that most of the evidence Solomon submitted with his appeal had previously been submitted with his first application. The Board noted that the Plan required the determination of the appropriate category of benefits to be based, in all cases, on all the facts and circumstances. The Board noted that Solomon failed to provide any persuasive medical reports generated during the critical four-month (November 2009 to March 31, 2010) period stating that he was totally and permanently disabled at that time. The Board noted that, in Solomon's first application and during the entire administrative process for that application, including hours of extensive medical review by multiple physicians chosen by Solomon himself and by the Plan, Solomon never claimed that he was unable to work because of neurological conditions. The Board noted that an extensive functional capacity exam performed on September 18, 2009 found that Solomon was able to work at that time, and also found evidence of variable effort. The Board unanimously denied Solomon's appeal; the three former players serving on the Board all joined in that decision.

Solomon sued. At the district court level, Solomon insisted the October 29,

2008 retroactive effective date issued by the SSA—a date obviously prior to the key March 31, 2010 date, but given in June 2011 without explanation—was binding on the Board. He did not provide his SSA file; he later refused to do so. He made a tactical decision to close the record, to stand on the naked, unexplained retroactive effective date from the SSA, and to rely on his ability to spin theories of conspiracy and bad faith, in the hopes of misdirecting the district court and tearing down the principles of judicial deference. Remarkably, it worked.

The district court analysis turns the ERISA abuse-of-discretion review on its head. It begins by holding that any ambiguity in the terms of the Plan "should be construed against the drafter."[5] This holding negates *Firestone*[6] and either misconstrues or ignores Fourth Circuit precedent saying that *contra proferentum* has no application in a case such as this.

The district court disagreed with another federal court decision squarely holding the Board was ***not*** bound by SSA effective dates.[7]

The district court (mis)stated that the key issue in the case is whether Solomon's disability "manifested" by March 31, 2010.[8] The district court used the

[5] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 12 (JA078).

[6] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

[7] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 13-18 (JA079-084).

[8] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 9 (JA075).

word "manifest" or "manifested" eight times, even though those words are nowhere in the Plan.

By substituting the word "manifest," rather than applying the actual requirement of whether Solomon was totally and permanently disabled, the district court was able to look over old records and pick evidence that Solomon's disability had "manifested" prior to the key March 31, 2010 date. The district court identified eleven facts to support its conclusion.[9] The first seven were ambiguous statements prior to November 2009, all considered and rejected by the Board in its final decision in November 2009. The last four related to medical evidence coming ***after*** the key March 2010 date, and were obviously of disputable probity. For example, the district court stated that "the most significant unrefuted evidence" was a June 2010 MRI finding the Solomon had "diffuse axonal injury," and that "[t]here is no evidence to support the notion that this condition manifested less than three months prior to the diagnosis."[10] Again, "manifested" is not the Plan standard. The standard is whether a Player is totally and permanently disabled. A diagnosis of diffuse axonal injury does not equate to total and permanent disability. It is a subclinical finding that says nothing about Solomon's ability to work.

The district court did not uphold the important values recognized by this

[9] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 21-22 (JA087-088).

[10] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 22-23 (JA088-089).

Court in *Evans*. The district misstated and misinterpreted key Plan provisions, and prevented a consistent application of the Plan. The district court construed all of the arguments and evidence in the light most favorable to Solomon, and substituted its own judgment for the unanimous judgment of the Board. Such actions are antithetical to the proper application of ERISA's abuse-of-discretion standard of review.

Perhaps another plan administrator would have accepted the naked SSA effective date and overlooked Solomon's refusal to provide the SSA record on which that decision was based. Perhaps another administrator would have even ignored a prior, final decision and the lack of contemporaneous medical evidence supporting Solomon's claim that he was totally and permanently disabled in the four months between November 2009 and March 31, 2010. There are facts and arguments on both sides of every issue. This is exactly the type of case where the Board's greater experience and familiarity with Plan terms is needed. This is exactly the type of case where the abuse-of-discretion standard should apply.

The Plan and the Disability Plan ask this Court to see through Solomon's allegations of bad faith. They ask this Court to uphold the unanimous decision of the Board. They ask this Court to uphold the integrity of the abuse-of-discretion standard of review.

STATEMENT OF THE CASE

I. The Plan

A. The Plan is maintained under collective bargaining, and gives its Taft-Hartley Board full and absolute discretion.

The Bert Bell/Pete Rozelle NFL Player Retirement Plan was established and is maintained pursuant to collective bargaining.[11] Under the current agreement, the costs of the Plan are deemed "Player Benefits Costs," and are charged against the funds available for the salary cap.[12] As such, the Plan's costs reduce the salary cap, they do not reduce NFL Club revenues.

The Plan is a Taft-Hartley plan. It is administered by the Retirement Board. The Board has six voting members. Three are former players appointed by the NFL Players Association, and three are League representatives appointed by the NFL Management Council.[13]

The Plan gives the Board "the broadest discretion permissible under ERISA and any other applicable laws."[14] The Board has "full and absolute discretion,

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[11] Plan Doc. Intro. (JA108).

[12] *See* Excerpt of 8/4/2011 NFL Collective Bargaining Agreement at 81 (attached as Addendum A).

[13] *See* 29 U.S.C. § 186(c)(5)(B) (allowing a multiemployer plan to be jointly administered by an equal number of employee and employer representatives); Plan Doc. § 1.3 (JA109) (providing Retirement Board is the administrator of the Plan); Plan Doc. § 8.1 (JA137) (describing makeup of the Retirement Board).

[14] Plan Doc. § 8.9 (JA141).

authority and power to interpret, control, implement, and manage" the Plan,[15] including the authority and power to "[d]efine the terms of the Plan," "construe the Plan," and "reconcile any inconsistencies therein."[16]

The Plan also gives the Board the authority and power to "[d]ecide claims for benefits."[17] Under the Plan, "[b]enefits… will be paid only if the… Retirement Board… decides in its discretion that the applicant is entitled to them."[18] "In deciding claims for benefits," the Board is to "consider all information in the… administrative record,"[19] and it has "full and absolute discretion to determine the relative weight to give such information."[20]

B. Players can qualify for T&P benefits in either of two ways.

The Plan offers T&P benefits to eligible Players. Under the Plan's "General Standard," an eligible Player qualifies for T&P benefits if he is found to be "substantially prevented from or substantially unable to engage in any occupation or employment."[21]

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[15] Plan Doc. § 8.2 (JA137).

[16] Plan Doc. § 8.2(a) (JA137).

[17] Plan Doc. § 8.2(b) (JA138).

[18] Plan Doc. § 8.9 (JA141).

[19] Plan Doc. § 8.9 (JA141).

[20] Plan Doc. § 8.9 (JA141).

[21] Plan Doc. § 5.2(a) (JA127).

An eligible Player may also qualify for T&P benefits if he is awarded disability benefits by Social Security. Plan Section 5.2(b) states:

> Social Security Awards. Effective April 1, 2007, a Player who has been determined by the Social Security Administration to be eligible for disability benefits under either the Social Security disability insurance program or Supplemental Security Income program, and who is still receiving such benefits at the time he applies, will be deemed to be totally and permanently disabled, unless four voting members of the Retirement Board determine that such Player is receiving such benefits fraudulently and is not totally and permanently disabled.[22]

C. The Plan has different categories of T&P benefits, and the Board must classify each qualifying Player "in all cases" based on the facts and circumstances.

Once a Player qualifies for T&P benefits, the next step is to determine the proper category. The key issue in this case is whether Solomon should receive benefits in the Football Degenerative category, or in the Inactive category. A Player is entitled to **Football Degenerative** T&P benefits if he became totally and permanently disabled due to NFL football and within 15 years of his last NFL season.[23] If either of those conditions is not met, a Player is entitled to **Inactive** benefits.[24]

There is no real causation issue in this case. The classification of Solomon's

[22] Plan Doc. § 5.2(b) (JA127).

[23] Plan Doc. § 5.1(c) (JA125).

[24] Plan Doc. § 5.1(d) (JA125).

T&P benefits therefore depends solely on whether he became totally and permanently disabled within 15 years of his last NFL season. Because Solomon's last NFL season ended on March 31, 1995, the key issue here is whether he was totally and permanently disabled prior to March 31, 2010.

Plan Section 5.5(a) provides that the "[c]lassification of total and permanent disability benefits under Section 5.1 will be determined by the Retirement Board… ***in all cases*** **on the facts and circumstances in the administrative record**.[25]

II. The Administrative Record

A. Solomon's first, March 2009, application

Solomon first applied for T&P benefits in March 2009, based solely on orthopedic impairments.[26] He submitted NFL team records and reports from several practitioners, including Dr. Mark Hudson (a family practitioner), Dr. Eddie Matsu (an orthopedist), and Brian Matuszak (an occupational therapist).

Under Section 5.2(c) of the Plan, Players seeking T&P benefits may be referred for an evaluation by one of the Plan's neutral physicians, a physician approved by both sides of the Board. Dr. George Canizares, a Plan neutral orthopedist, evaluated Solomon in April 2009 and reported that Solomon was not totally and permanently disabled because he was capable of light duty, sedentary-

[25] Plan Doc. § 5.5(a) (JA129) (emphasis added).

[26] 3/16/2009 Application for Disability Benefits at 4 (JA574); 4/7/2009 Ltr. fr. J. Solomon to NFL Players Assoc. (JA585).

type work.[27]

Claims for disability benefits are first reviewed by the Plan's Disability Initial Claims Committee ("Committee").[28] After reviewing the record, the Committee denied Solomon's March 2009 application.[29]

Solomon appealed to the Board and submitted additional records. One record was from a Dr. William Henderson, an orthopedist, and it indicated that Solomon was not totally and permanently disabled, although he could no longer play NFL football or engage in rigorous physical activity as a high school football coach.[30]

Solomon and his complete file were sent to the Rehabilitation Institute of Chicago for a comprehensive functional capacity evaluation ("FCE"). That FCE took place on September 18, 2009. It concluded:

> Mr. Solomon demonstrated variable effort throughout the evaluation. He is currently functioning at the sedentary work level, however, due to the inconsistent nature of his performance, these tolerances should be considered a minimum of his true functional capabilities.[31]

During this comprehensive exam, Solomon identified only orthopedic

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[27] *See* 4/17/2009 Physician's Report Form at 2 (JA587-588).

[28] Plan Doc. § 8.5 (JA139); Plan Doc. § 8.2(b) (JA138).

[29] 5/18/2009 Ltr. fr. P. Scott to J. Solomon at 1 (JA600).

[30] 7/16/2009 Ltr. fr. Dr. W.D. Henderson (JA613-614).

[31] 9/18/2009 Functional Capacity Evaluation at 2 (JA627).

impairments, and indicated that his knees were his biggest problem.[32] There were no complaints of head trauma or cognitive impairments.

On November 19, 2009, the Board denied Solomon's appeal.[33] The letter explaining the decision focused on the September 2009 FCE, and stated that the Board believed that FCE was the "most authoritative, because [it took] into account all prior medical reports, including the reports… that [Solomon] submitted in support of [his] claim."[34] The letter also stated that Solomon "ha[d] the right to bring an action under section 502(a)" of ERISA.[35]

B. Solomon's second, December 2010, application

Following the denial of his first application, Solomon was barred from applying again for T&P benefits under the General Standard if his claim was based solely on his original—in this case orthopedic—impairments. However, Solomon was not barred from filing a new application if he believed he had become totally and permanently disabled for any "new" reason, such as CTE.[36] He also could have applied again immediately if he received an award of SSA disability

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[32] 9/18/2009 Exam. Report fr. Dr. J. Press at 1 (JA629).

[33] *See generally* 11/25/2009 Ltr. fr. S. Gaunt to J. Solomon (JA644).

[34] 11/25/2009 Ltr. fr. S. Gaunt to J. Solomon at 2 (JA645).

[35] 11/25/2009 Ltr. fr. S. Gaunt to J. Solomon at 2 (JA645).

[36] *See* Plan Doc. § 5.2(d) (JA127-128) (outlining exception to rule prohibiting serial applications).

benefits.[37]

Solomon applied for T&P benefits a second time in December 2010. Solomon's December 2010 application claimed that he was now disabled by cognitive and psychological impairments, in addition to orthopedic impairments.[38] Solomon submitted a December 2010 polysomnography report and some prescription records with the application,[39] which was peculiar because none of these documents stated that he was totally and permanently disabled in December 2010, or at any point prior.

Following the second application, two additional Plan neutral physicians evaluated Solomon. Dr. Glenn Perry, a neutral orthopedist, examined Solomon on January 6, 2011 and reported that Solomon was not totally and permanently disabled because he could engage in light duty or sedentary-type employment.[40] Dr. Adam DiDio, a neutral neurologist, saw Solomon on February 17, 2011, and reported that Solomon was totally and permanently disabled due to cognitive

[37] Plan Doc. § 5.2(d) (JA127-128).

[38] 12/17/2010 Application for Disability Benefits at 3 (JA669).

[39] 12/7/2010 Polysomnography Report (JA660); Medical Expenses (JA679); Prescriptions Purchased (JA684).

[40] 1/6/2011 Physician's Report Form at 2 (JA687); 1/17/2011 Progress Notes at 2 (JA689).

impairment, anxiety/depression, and headaches.[41]

On March 9, 2011, the Committee considered Solomon's December 2010 application and deadlocked on whether he was totally and permanently disabled under the terms of the Plan. He was therefore denied.[42]

On April 27, 2011, Solomon appealed the Committee's denial.[43] He submitted additional records, all dated from April 2011, more than a year after the 15-year cut-off. Solomon was scheduled to attend another functional capacity evaluation with the Plan's neutral physicians, but before the evaluation could take place Solomon produced a Notice of Decision showing that he had been approved for SSA benefits. The Notice of Decision stated, in substantive part:

> I [an Administrative Law Judge] carefully reviewed the facts of your case and made a fully favorable decision on your application(s) for a period of disability, disability insurance benefits, and Supplemental Security Income filed on July 13, 2009 and December 20, 2010. I stated the basis for my decision at your hearing held on June 16, 2011. I adopt the findings of fact and reasons that I gave at the hearing. Please read this notice of decision.
>
> I found you disabled as of October 29, 2008 because your impairment or combination of impairments is so severe that you cannot perform any work existing in significant numbers in the national economy.…[44]

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[41] *See generally* 2/17/2011 Physician's Report Form (JA716).

[42] 3/9/2011 Ltr. fr. P. Scott to J. Solomon at 1 (JA758).

[43] 4/27/2011 Ltr. fr. J. Solomon to Retirement Board (JA775) (appealing deemed denial and enclosing records, JA767-773).

[44] 6/21/2011 Notice of Decision at 1 (JA783).

The Notice of Decision did not describe, and Solomon did not identify, the evidence supporting the disability finding or the October 29, 2008 disability date assigned by the Administrative Law Judge. Nothing in the administrative record fully explains the basis for the Social Security disability decision and the corresponding disability onset date. In the proceedings below, however, two things became clear. One: The Administrative Law Judge selected October 29, 2008, a date prior to the Board's decision on Solomon's first application for T&P benefits, based on a report from an occupational therapist, Brian Matuszak, which the Board had already considered and rejected.[45] Two: The Administrative Law Judge never saw any of the reports prepared by the Plan's neutral physicians.

On August 4, 2011, the Board granted Solomon's application for T&P benefits under the Plan's Social Security provision. The Board awarded Solomon Inactive benefits because it found "the record did not support a finding of total and permanent disability prior to March 31, 2010," *i.e.*, the 15-year cut-off.[46] The decision letter gave Solomon the right to appeal the Inactive classification.[47]

On September 27, 2011, Solomon appealed again, arguing he was entitled to

[45] *See* 8/21/2015 Pl.'s Mem. in Opp. to Defs.' Mot. for Sum. Jgmt. [ECF Doc. 32] at 1 ("…the SSA expressly found Mr. Solomon to be totally and permanently disabled ("TPD") by October 29, 2008 based on a lengthy evaluation by an occupational therapist.").

[46] 8/10/2011 Ltr. fr. S. Gaunt to J. Solomon at 4 (JA808).

[47] 8/10/2011 Ltr. fr. S. Gaunt to J. Solomon at 4 (JA808).

Football Degenerative benefits because his March 2009 application was filed before, and the SSA's chosen disability date occurred before, the applicable 15-year cut-off for Football Degenerative benefits.[48] Solomon (re)submitted evidence that (1) the Board had already considered and rejected, or (2) did not directly address his disability status prior to March 31, 2010.[49]

On November 16, 2011, after further review, the Board denied Solomon's appeal. The decision was unanimous; all three former players serving on the Board in that decision. The decision letter stated that the record did not establish that Solomon was totally and permanently disabled prior to March 31, 2010:

> First, the Retirement Board noted that you previously applied for total and permanent disability benefits in 2009, and that your claim was denied as was your appeal. The Retirement Board determined that the disposition of that earlier claim is incompatible with finding that you were totally and permanently disabled prior to March 31, 2010. Second, the Retirement Board noted your argument that the Social Security Administration set the effective date of your disability benefits at October 29, 2008. The Retirement Board found that such effective date decisions are not binding on the Plan, and that the issue of the classification is based on all of the facts and circumstances. In this case, the Retirement Board found that the facts and circumstances do not support a finding that you became totally and permanently disabled prior to March 31, 2010. That is because the medical records you submitted with your current appeal were submitted together with

[48] 9/27/2011 Ltr. fr. J. Solomon to Retirement Board (JA810).

[49] *See* 9/27/2011 Ltr. fr. J. Solomon to Retirement Board (JA810) (appealing classification decision and submitting documents, (JA783-785); (JA789-795); (JA568); (JA651); (JA604); (JA477-478); (JA465-467); (JA653); (JA765); (JA535-564)).

your prior claim and appeal, both of which were denied.[50]

III. The Proceedings Below

Solomon filed suit on November 14, 2014, three years after the Board's decision. Solomon alleged the Board's decision denying him Football Degenerative benefits was an abuse of discretion for two reasons. First, Solomon argued that the terms of the Plan force the Board to accept the SSA onset date.[51] Second, Solomon argued the Board failed to credit "overwhelming evidence" showing he became totally and permanently disabled due to CTE prior to March 31, 2010.[52]

The district court decided the case on cross-motions for summary judgment[53] and held that Solomon was entitled to Football Degenerative benefits for the reasons urged by Solomon. The district court reasoned that (1) the Board was bound to accept the Social Security Administration's disability onset date as the date of Solomon's total and permanent disability under Section 5.2(b) of the Plan,[54] and (2) even if the Retirement Board did not have to accept the Social Security Administration's disability onset date, the Board abused its discretion

[50] 11/23/2011 Ltr. fr. S. Gaunt to J. Solomon at 2 (JA823).

[51] Compl. ¶¶ 30-31 (JA016-017).

[52] Compl. ¶ 28 (JA016).

[53] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 1 (JA067).

[54] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 11 (JA077).

when it determined that the record evidence did not support a finding that Solomon was totally and permanently disabled prior to March 31, 2010.[55]

SUMMARY OF THE ARGUMENT

The district court clearly erred when it concluded that the Board must adopt an SSA disability onset date. The terms of Plan do not require a wholesale adoption of an SSA disability onset date when classifying a Player's T&P benefits. The Classification Rules are independent of the Social Security provision, and they require that classification decisions be based, "in all cases," on all of the facts and circumstances within the administrative record.[56] The Plan does not give added weight to SSA disability onset dates, much less make them dispositive. The Board consistently interpreted the Plan this way, consistently informed Players of its interpretation, and successfully advanced its interpretation in federal court.

The district court erred as a matter of law when it invoked *contra proferentum*—the insurance-law principle that contractual ambiguity should be construed against the drafter—to construe the Social Security provision in the 2009 version of the Plan against the Retirement Board.[57] *Contra proferentum* does not apply where (i) the Retirement Board has discretionary authority to interpret the

[55] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 18 (JA084).

[56] Plan Doc. § 5.5(a) (JA129).

[57] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 12 (JA078).

terms of the Plan (*i.e.*, the abuse of discretion standard of review applies), and (ii) the Plan is a Taft-Hartley plan produced through collective bargaining between the NFL Players Association and the NFL Management council (*i.e.*, there is no conflict of interest).

Once the Board's interpretation is upheld, the only remaining question is whether the Board abused its discretion when it concluded that the record did not show that Solomon had become totally and permanently disabled prior to March 31, 2010. The district court said the Retirement Board's "determination, that Solomon was not [totally and permanently disabled] as of March 31, 2010 based on his cognitive impairments, was not 'the result of a deliberate, principled reasoning process and… supported by substantial evidence.'"[58] However, the district court misunderstood the Plan's requirements for T&P benefits; it ignored Solomon's application history and the impact that history had on the Board's decision; and it impermissibly reweighed and resolved the evidence without giving due deference to the Board's discretionary authority to do the same.

When Solomon reapplied for T&P benefits in December 2010, there was already a final decision on the books that he was not totally and permanently disabled as of November 2009. Nothing in ERISA or the terms of the Plan allowed Solomon to undo that final decision, and the Board was entitled to rely on

[58] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 21 (JA087).

it. Solomon was given ample opportunity to show that he was totally and permanently disabled after November 2009 and before the March 31, 2010 cut-off for Football Degenerative benefits. Yet Solomon presented a record devoid of persuasive evidence that he was totally and permanently disabled within that crucial timeframe. The Board saw this, and it reasonably concluded that Solomon was not entitled to Football Degenerative benefits on this basis.

Solomon's attempt to poke holes in the Board's decision highlights the evidentiary void and his failure to carry his burden of proof. Ultimately, even if viewing the evidence in the light most favorable to Solomon suggests another plan administrator could have reached a contrary conclusion, that does not mean the Board's decision was an abuse of discretion.

STANDARD OF REVIEW

This Court reviews the district court's decision *de novo*, employing the same standards that governed the district court's review of the Board's decision.[59] Because the Plan gives the Board discretionary authority to interpret the terms of the Plan and decide claims for benefits, this Court evaluates the Board's decision only for an abuse of discretion.[60]

Under the abuse-of-discretion standard of review, the Court should uphold

[59] *Champion v. Black & Decker (U.S.) Inc.*, 550 F.3d 353, 360 (4th Cir. 2008).

[60] *Firestone*, 489 U.S. at 111; *Champion*, 550 F.3d at 359; *Evans*, 514 F.3d at 321.

any reasonable decision by the Board.[61] A "decision is reasonable 'if it is the result of a deliberate, principled reasoning process and if it is supported by substantial evidence.'"[62] "[O]n the whole," the decision must follow the terms of the Plan, "rest on good evidence and sound reasoning," and "result from a fair and searching process."[63] A decision is not unreasonable merely because Solomon, or this Court, might find some basis to disagree with it.[64]

The abuse-of-discretion standard "is a message to courts, counseling not judicial abdication, to be sure, but a healthy measure of judicial restraint" that is designed to protect "important values," such as:

> the plan administrator's greater experience and familiarity with plan terms and provisions; the enhanced prospects of achieving consistent application of those terms and provisions that results; the desire of those who establish ERISA plans to preserve at least some role in their administration; and the importance of ensuring that funds which are not unlimited go to those who, according to the terms of the plan, are truly deserving.[65]

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[61] *See Evans*, 514 F.3d at 322 ("[I]n ERISA cases, the standard equates to reasonableness: We will not disturb an ERISA administrator's discretionary decision if it is reasonable . . . .").

[62] *Id.* (quoting *Bernstein v. CapitalCare, Inc.*, 70 F.3d 783, 788 (4th Cir. 1995)).

[63] *Id.* at 322-23.

[64] *Id.* at 322 ("At its immovable core, the abuse of discretion standard requires a reviewing court to show enough deference to a primary decision-maker's judgment that the court does not reverse merely because it would have come to a different result in the first instance.").

[65] *Id.* at 323.

As the Supreme Court explained:

> *Firestone* deference protects these interests and, by permitting an employer to grant primary interpretive authority over an ERISA plan to the plan administrator, preserves the "careful balancing" on which ERISA is based. Deference promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation. It also promotes predictability, as an employer can rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from *de novo* judicial review. Moreover, *Firestone* deference serves the interest of uniformity, helping to avoid a patchwork of different interpretations of a plan, like the one here, that covers employees in different jurisdictions—a result that "would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them."[66]

For all of these reasons, the Court should not "forget its duty of deference and its secondary rather than primary role in determining a claimant's right to benefits."[67]

ARGUMENT

I. The Board Was Not Bound By The SSA Disability Onset Date.

A. The Plan requires that classification be based, in all cases, on the facts and circumstances.

Solomon's primary argument that the Board must accept an SSA onset date under Section 5.2(b) of the Plan is plainly wrong. Plan Section 5.2(a) provides the

[66] *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987)).

[67] *Evans*, 514 F.3d at 323.

General Standard for eligibility for T&P benefits, and Plan Section 5.2(b) generously allows eligible Players awarded SSA disability benefits to receive Plan T&P benefits. Section 5.2(b) provides that a Player awarded SSA disability benefits "will be deemed to be totally and permanently disabled…."[68] It says nothing about classification.

After the Board determines a Player is eligible for T&P benefits under either Section 5.2(a) or 5.2(b), it must then determine which category of benefits applies. Plan Section 5.5(a)—the Classification Rules—states how this should be done:

> Classification of total and permanent disability benefits under Section 5.1 will be determined by the Retirement Board… ***in all cases*** on the facts and circumstances in the administrative record.[69]

This language is clear. Classification must be based, "***in all cases***," on the facts and circumstances in the record. Section 5.5(a) does not say that the SSA will determine the classification of a Player's T&P benefits. It does not afford special weight to an SSA finding about the commencement of a Player's Social Security disability, let alone require automatic adoption of an SSA onset date.

The Board has always interpreted the "in all cases" directive to require it to classify T&P benefits based on all of the evidence in the administrative record, regardless of whether the Player qualified under the General Standard or the Social

[68] Plan Doc. § 5.2(b) (JA127).

[69] Plan Doc. § 5.5(a) (JA129) (emphasis added).

Security provision. The Board has never interpreted the Plan to require automatic adoption of SSA onset dates.

The Board explained its view that SSA disability onset dates are not binding in numerous decision letters to Players, including those sent to Solomon.[70] It also successfully advanced its interpretation in prior litigation. Prior to the decision below, another federal court specifically held that the Board is not bound by SSA onset dates:

> Section 5.2(b) of the Plan does one thing and one thing only—it deems any Player who receives a disability determination made by the SSA to be totally and permanently disabled under the Plan. That entitles the Player to T&P disability benefits, but does not determine the category of those benefits.… Consequently, this Court concludes that the Board's decision that the SSA's determination of the date of disability does not obligate the Plan to award a certain category of T&P disability benefits is not wrong.[71]

The district court erred when it rejected the Board's interpretation in favor of its own. The question is not whether the Court thinks an alternate interpretation is better than the Board's.[72] The question is whether the Retirement Board's

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[70] *See, e.g.*, 11/23/2011 Ltr. fr. S. Gaunt to J. Solomon at 2 (JA823).

[71] *Bryant v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, No. 1:12-cv-936-MHC, 2015 U.S. Dist. LEXIS 176748 (N.D. Ga. March 23, 2015).

[72] *See Firestone*, 489 U.S. at 111 ("A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable."); *Eckelberry v. Reliastar Life Ins. Co.*, 469 F.3d 340, 343 (4th Cir. 2006) ("Under this [abuse-of-discretion] standard, we do not search for the best interpretation of a plan or even for one we might independently adopt. Rather, when reviewing a plan administrator's decision, a

interpretation was reasonable at all. And it was. The Board's determination that it need not automatically accept SSA disability onset dates was consistent with the terms of the Plan and consistently applied to countless other Players before and after Solomon. The district court completely ignored the importance of ensuring a "consistent application of [Plan] terms and provisions."[73]

The district court also would write the words "in all cases" out of Section 5.5(a) of the Plan. "ERISA plans, like contracts, are to be construed as a whole."[74] If the district court were correct that Section 5.2(b) forced the Board to adopt an SSA disability date when classifying a Player's T&P benefits, then the terms of Section 5.5(a) that reserve classification decisions for the Retirement Board based, "in all cases," on all of the facts and circumstances in the record, would be superfluous.[75]

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court 'will not disturb any reasonable interpretation.'") (quoting *Baker v. Provident Life & Accident Ins. Co.*, 171 F.3d 939, 941 (4th Cir. 1999)); *Boyd v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 796 F. Supp. 2d 682, 692 (D. Md. 2011) ("Where a plan administrator has offered a reasonable interpretation of disputed provisions, [a court] may not replace it with an interpretation of [its] own.") (quoting *Booth v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan*, 201 F.3d 335, 344 (4th Cir. 2000)) (alteration in *Boyd*).

[73] *Evans*, 514 F.3d at 323.

[74] *Johnson v. Am. United Life Ins. Co.*, 716 F.3d 813, 820 (4th Cir. 2013) (quoting *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 93 (3d Cir. 1992).

[75] *See Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1218 (11th Cir. 2011) (stating it "is an interpretative no-no" to adopt an interpretation that renders other Plan provisions superfluous); *Johnson*, 716 F.3d at 820 ("[C]ourts should seek to

B. The doctrine of *contra proferentum* does not apply.

The Board consistently interpreted the Plan; it never considered SSA onset dates to be binding. Nevertheless, to write their intent in the Plan, in 2012 the bargaining parties amended it to state that "determinations by the Social Security Administration as to the timing . . . of total and permanent disability are not binding" on the Board.[76] This amendment endorsed the Board's interpretation of the Plan, and was plainly intended to put an end to claims in litigation (like this one) that SSA onset dates were binding.

In the proceedings below, Solomon argued that, prior to the 2012 amendment, the Plan was ambiguous on whether SSA onset dates were binding, and that this ambiguity should be construed in his favor under the *contra proferentum* doctrine. The district court latched onto that argument and made *contra proferentum* the lynchpin of its decision to reject the Board's interpretation.[77] That was erroneous as a matter of law. It is ironic, to say the least, to see an amendment cementing the Board's longstanding interpretation of

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give effect to every provision in an ERISA plan, avoiding any interpretation that renders a particular provision superfluous or meaningless."); *Ellis v. Liberty Life Assur. Co. of Boston*, 394 F.3d 262, 272 n.23 (5th Cir. 2004) (rejecting plaintiff's suggested interpretation of plan language because it would render plan provisions superfluous or internally inconsistent).

[76] Plan Doc. § 5.7(a) (eff. Apr. 1, 2014) (JA213).

[77] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 12 (JA078).

Plan language used against the Board to avoid that very interpretation.

First, even if one argued that the 2009 Plan, standing alone, was ambiguous, there is no longer any ambiguity thanks to the 2012 amendment. There could be no clearer manifestation of the bargaining parties' intent with respect to SSA onset dates than an amendment expressly stating that they are not binding.[78]

Second, assuming *arguendo* there was ambiguity, the Board has always had full and absolute discretion to "[d]efine the terms of the Plan," "construe the Plan," and "reconcile any inconsistencies therein."[79] Under *Firestone* and decades of established jurisprudence, that discretion should be honored here to permit the Board to resolve the ambiguity. As this Court recognized in *Carden v. Aetna Life Ins. Co.*, a grant of discretionary authority "forecloses" application of the *contra proferentum* rule, which would improperly "curb the [interpretive] discretion given an administrator by a plan."[80] It simply makes no sense to say the Board can

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[78] *See Firestone*, 489 U.S. at 112 ("The terms of trusts created by written instruments are 'determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible.'") (quoting Restatement (Second) of Trusts § 4, Comment d (1959)); *id*. at 112-13 (If a court must construe the terms of an ERISA plan, the court should "look[ ] to the terms of the plan and other manifestations of the parties' intent").

[79] Plan Doc. § 8.2(a) (JA137).

[80] *Carden v. Aetna Life Ins. Co.*, 559 F.3d 256, 260 (4th Cir. 2008). *See Strauch v. Exelon Corp.*, No. JKB-13-1543, 2013 WL 6092520, at *3 (D. Md. Nov. 18, 2013) ("*Contra proferentum* only applies in cases where the ERISA plan at issue does not grant the plan administrator discretionary authority, and accordingly, courts review

interpret any ambiguity in the Plan, only to then nullify that authority in court under the doctrine of *contra proferentum*.

The concerns that motivate the *contra proferentum* doctrine are absent in this case. *Contra proferentum* evolved to protect insureds from insurers who drafted and funded insurance plans, and who by virtue of this conflict were incentivized to deny coverage to the insured. But this Plan was drafted by the NFL Management Council and the NFL Players Association, not the Board. The Board has no conflict of interest, and does not fund the Plan.[81]

II. The Board Did Not Abuse Its Discretion When It Determined The Record As A Whole Did Not Show Solomon Was Totally And Permanently Disabled Prior To March 31, 2010.

The Board focused on Solomon's disability status between November 2009 and March 31, 2010, the 15-year Football Degenerative cut-off. It was reasonable

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the administrator *de novo*."); *I.V. Servs. of Am., Inc. v. Trs. of Am. Consulting Eng'rs Council Ins. Trust Fund*, 136 F.3d 114, 121 n.9 (2nd Cir. 1998) (same); *Ross v. Ind. State Teacher's Ass'n Ins. Trust*, 159 F.3d 1001, 1011 (7th Cir. 1998) (same).

[81] Every court to consider the question has found that the Board, due to its structure as well as the funding structure of the Plan, does not suffer from any conflict of interest that might impact the impartiality of its decisions. *See, e.g.*, *Boyd*, 796 F. Supp. 2d at 690-91 ("In this District, two post-*Glenn* courts have held that the Board is not conflicted by virtue of its composition…. I find the reasoning of these cases to be persuasive, and I too hold that the Board does not suffer from a conflict of interest.") (citing *Stewart v. Bert Bell/Pete Rozelle NFL Ret. Plan*, 1:09-cv-02612-WDQ, 2011 WL 10005532 (D. Md. Jan. 13, 2011), and *Sagapolutele v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, No. 1:08-cv-01870-WMN, 2008 U.S. Dist. LEXIS 121061 (D. Md. Oct. 22, 2008)).

for the Board to narrow its inquiry in this way and, given the state of the record, it was equally reasonable for the Board to determine that Solomon had not shown that he was totally and permanently disabled within that crucial timeframe.

A. The terms of the Plan support a determination that Solomon was not totally and permanently disabled as of November 19, 2009.

The Board denied Solomon's first application for T&P benefits in November 2009. That decision was unanimous: All six voting members, including three former NFL players, denied the application. If Solomon felt the Board had overlooked an impairment in November 2009 or gotten that decision wrong in some other way, he could have asked the Board to reconsider, or he could have appealed the decision in federal court. Solomon did neither, and that has consequences.

When Solomon reapplied for benefits in December 2010, the Board was entitled to stand on its prior decision and conclude that Solomon was not totally and permanently disabled, for any reason, as of November 19, 2009. Both ERISA and the Plan's claims procedures contemplate a review process that produces a ***final*** decision on a Player's claim for benefits. That finality would be undone if Solomon could collaterally attack a prior, final determination through subsequent, repeated applications. Gamesmanship of that sort hinders the administrative process, it unduly burdens the Plan and its participants, and the Board does not allow it.

Solomon will argue that Section 5.2(d), the Plan's serial application rule, somehow undermines the finality of the Board's November 2009 decision, and the district court seemed to agree.[82] However, the serial application rule reinforces the importance of finality by preventing a new application for T&P benefits within 12 months following the date of a final denial, unless (1) there is a new injury or condition, or (2) the Player receives an SSA disability award.[83] But even when Section 5.2(d) allows a serial application, the rule does not require the Board to disregard its prior, final decision entirely and find the Player totally and permanently disabled at some point prior to the date of the Board's earlier determination.

The district court not only upended the finality of the administrative process, it also allowed Solomon to simultaneously violate the Plan's limitations provision. Section 11.7(a) of the Plan provides that "[n]o suit or legal action with respect to an adverse benefit determination may be commenced more than forty-two months from the date of the final decision on the claim for benefits (including the decision on review)."[84] This limitations provision is enforceable,[85] and under it, Solomon's

[82] *See* 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 23 (JA089) (characterizing the Plan's argument as "untenable at least by virtue of § 5.2(d)").

[83] Plan Doc. § 5.2(d) (JA127-128).

[84] Plan Doc. § 11.7(a) (JA150).

ability to challenge any aspect of the Board's November 19, 2009 final decision should have ended on May 19, 2013—or more than 18 months before he filed this lawsuit. The district court's decision, however, undoes the Board's November 2009 decision entirely. Thus, if the district court's decision stands, it would essentially mean that Solomon successfully overturned an unreviewable Board decision in blatant violation of the Plan's limitations provision.

B. Substantial evidence supported the Board's determination that Solomon was not totally and permanently disabled as of November 19, 2009.

Even if the Board had been permitted and inclined to disregard the finality of its November 2009 decision, there is abundant, and certainly substantial, evidence to support the Board's determination that Solomon was not totally and permanently disabled as of November 2009. Solomon's second application presented no new medical evidence showing that he was totally and permanently disabled prior to November 2009. There was only the record underlying his first application, and that contained reports from two Plan neutral physicians who had reported that Solomon was not totally and permanently disabled. One of those reports was a comprehensive FCE performed in September 2009, which concluded that Solomon was not totally and permanently disabled and found evidence of variable effort,

[85] *See Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 611-12 (2013) ("The principle that contractual limitations provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA plan.").

and the Board found this to be important evidence. Although the record contained some evidence that Solomon was totally and permanently disabled, it was not an abuse of discretion for the Board to credit the findings of the Plan neutral physicians and conclude that Solomon was not totally and permanently disabled prior to November 2009.[86]

C. The record is devoid of persuasive, contemporaneous evidence showing that Solomon was totally and permanently disabled between November 2009 and March 31, 2010.

The key issue in this case is whether Solomon was totally and permanently disabled between November 19, 2009 and the March 31, 2010 cut-off. There is no persuasive, contemporaneous medical evidence showing that Solomon was totally and permanently disabled at any point, or for any reason, from November 2009 through March 31, 2010.

In fact, the record contains only two bits of evidence that even arguably address Solomon's ability to work between November 19, 2009 and March 31,

[86] *See Evans*, 514 F.3d at 323-26 (reversing district court and upholding plan administrator's decision to deny application for total and permanent disability benefits in light of conflicting medical evidence); *Atkins v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 694 F.3d 557, 570 (5th Cir. 2012) ("Given this set of mixed medical opinions and a standard that requires us to uphold a plan's benefits determination absent an abuse of discretion, we must affirm the district court's judgment affirming the Retirement Board's decision to award Inactive benefits. . . . [T]he [Retirement] Board's decision does not meet the standard for an abuse of discretion given the mixed collection of evidence that could have been construed to support an award of either Inactive *or* Football Degenerative benefits.").

2010, and neither establishes his entitlement to Football Degenerative benefits. The first is a March 31, 2010 letter written by Dr. Matsu, one of Solomon's orthopedists. It is the only record evidence generated after the Board's November 19, 2009 decision and, arguably, prior to the March 31, 2010 cut-off. The cursory letter vaguely references an "updated functional capacity evaluation" that is not in the record and states that "[i]t is clear that Mr. Solomon is disabled and is not able to perform any physical activities nor sedentary type of work because of his injuries and the objective data supporting his condition as per testing analysis."[87] This five-sentence letter repeats an opinion already considered and rejected by the Board in November 2009. It is also inconsistent with the detailed report of Dr. Glenn Perry, a neutral orthopedist who examined Solomon **on January 6, 2011**, and reported **Solomon was not totally and permanently disabled even then**.[88]

The second piece of evidence is the June 21, 2011 SSA Notice of Decision that precipitated Solomon's award of Inactive T&P benefits and spawned this lawsuit. The Notice of Decision provides an October 29, 2008 Social Security disability onset date, but (1) that date is totally irreconcilable with the Retirement Board's determination that Solomon was not totally and permanently disabled

[87] 3/31/2010 Ltr. fr. Dr. Matsu to "whom it may concern" (JA651).

[88] *See* 1/6/2011 Physician's Report Form at 2 (JA687); 1/17/2011 Progress Notes at 2 (JA689) ("I believe that the patient could engage in occupations consisting of light duty or sedentary with walking.").

prior to November 19, 2009, and (2) the Notice of Decision does not describe the evidence that led the Administrative Law Judge to conclude that Solomon was disabled at all, much less disabled on a date nearly three years removed from the date of the Notice of Decision. It appears the onset date was based on the report of Solomon's occupational therapist, Brian Matuszak, which again was considered and rejected by the Board when it made its final decision in November 2009. The SSA onset date also contradicts Dr. Canizares' report that Solomon was not totally and permanently disabled in **April 2009**,[89] the Rehabilitation Institute of Chicago's functional capacity evaluation that showed Solomon was capable of at least sedentary work in **September 2009**,[90] and Dr. Perry's report that Solomon was not totally and permanently disabled from an orthopedic perspective as late as **January 2011**.[91]

D. Solomon's CTE allegations are a smokescreen.

In this litigation, Solomon has insisted that he was totally and permanently disabled by CTE for years prior to his December 2010 application. Solomon will

[89] 4/17/2009 Physician's Report Form at 2 (JA588) (neutral orthopedist, Dr. Canizares, concluding that Solomon is not totally and permanently disabled).

[90] 9/18/2009 Functional Capacity Evaluation at 2 (JA627) (neutral occupational therapist, Maureen Ziegler, concluding that Solomon is capable of sedentary employment).

[91] 1/6/2011 Physician's Report Form at 2 (JA687) (neutral orthopedist, Dr. Perry, concluding that Solomon is not totally and permanently disabled).

point to a litany of CTE-related evidence that comes ***after*** the 15-year Football Degenerative cut-off, pile inference upon inference, and criticize the Board for failing to connect the dots and give him the benefit of the doubt about when he first became totally and permanently disabled. Doing so merely highlights the evidentiary void and Solomon's failure to carry his burden to show his entitlement to benefits.[92]

No one is disputing that Solomon has some impairment(s) related to NFL football. Merely acknowledging that an impairment exists, however, does not address the key issue of whether Solomon was totally and permanently disabled prior to the March 31, 2010 deadline. Thus, the observation that Solomon's condition slowly worsened over a five to ten year period, if true, cannot fairly be used against the Board.[93] The Court can no doubt "appreciate the difficulty of determining an exact date of total and permanent disability in the case of a

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[92] *See Donnell v. Metro. Life Ins. Co.*, 165 Fed. App'x 288, 296 n.9 (4th Cir. 2006) ("[A participant] has the burden to prove that she is entitled to receive disability benefits under the Plan."); *Roganti v. Metro. Life Ins. Co.*, 786 F.3d 201, 211-12 (2d Cir. 2015) ("An ERISA plan administrator . . . . owes a fiduciary duty not just to the individual participant or beneficiary whose claim is under review, but to all of the participants and beneficiaries of the plan. As a result, ERISA requires a balance between the obligation to guard the assets of the trust from improper claims [and] the obligation to pay legitimate claims. In striking this balance with respect to a particular claim, a fiduciary must, among other things, assess whether the claimant has furnished sufficient evidence that he is entitled to the benefits he seeks.") (citations and quotation marks omitted).

[93] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 23 (JA089).

degenerative illness"[94] such as Solomon's. In the face of that difficulty, and given the burden of proof, it seems eminently reasonable for the Board to conclude that Solomon was not totally and permanently disabled prior to March 31, 2010 when—up to that point in time—Solomon had never sought treatment for CTE, and no doctor had ever evaluated Solomon for it, much less opined that he was totally and permanently disabled by CTE.[95]

Further, although the cause of Solomon's total and permanent disability was and is not the issue, the Board was justifiably skeptical of his claim that he had a longstanding total and permanent disability caused by CTE. It does not add up. Solomon's first application for T&P benefits—decided just four months prior to the Football Degenerative deadline and 11 months prior to his second application—was based on orthopedic impairments alone; it had nothing to do with CTE. Likewise, the October 29, 2008 SSA disability onset date—a date Solomon insists the Board must adopt—is based on an October 29, 2008 functional capacity report that had nothing to do with CTE. Thus, the very things that Solomon

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[94] *Marshall v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 261 Fed. App'x 522, 526, (4th Cir. 2008).

[95] *See* 7/31/2015 Mem. in Supp. of Pl.'s Mot. for Sum. Jgmt. [ECF Doc. 23-1] at 11 (explaining that the June 11, 2010 examination by Dr. Fernandez "was the first time that a mental health professional… had examined Mr. Solomon to determine the effect of his multiple concussions on his ability to work").

pointed to when he originally asked the Board to award him Inactive benefits undercut his allegations.

E. The district court impermissibly reweighed the evidence and usurped the Board's authority.

The district court selected bits and pieces of evidence favorable to Solomon, extrapolated from that evidence, and discounted all of the other facts and circumstances that supported the Board's decision. That is the antithesis of abuse-of-discretion review.[96] The Board "did not abuse its discretion merely because there was evidence before it that [arguably] would have supported an opposite decision" on Solomon's request for Football Degenerative benefits.[97]

The following passage from the district court opinion best exhibits the tremendous overreach in this case:

> Perhaps the most significant unrefuted evidence is the confirmation of the pre-March 31, 2010 cognitive disability by the June 2010 diagnosis of diffuse axonal injury. There is no evidence to support the notion that this condition manifested less than three months prior to

[96] *Evans*, 514 F.3d at 323-26 (reversing district court and upholding plan administrator's decision to deny application for total and permanent disability benefits in light of conflicting medical evidence); *Atkins*, 694 F.3d at 570 ("Given this set of mixed medical opinions and a standard that requires us to uphold a plan's benefits determination absent an abuse of discretion, we must affirm the district court's judgment affirming the Retirement Board's decision to award Inactive benefits.… [T]he [Retirement] Board's decision does not meet the standard for an abuse of discretion given the mixed collection of evidence that could have been construed to support an award of either Inactive *or* Football Degenerative benefits.").

[97] *Bolling v. Eli Lilly and Co.*, 990 F.2d 1028, 1029-30 (8th Cir. 1993).

> the diagnosis. Moreover, in February 2011, the Plan's own neurologist noted that Solomon had suffered from worsening cognition over 5-10 years, not that his condition had suddenly deteriorated in the 11 months since March 31, 2010.[98]

First, when a "condition manifested" is irrelevant. The Plan awards T&P benefits depending on if a Player is and when he became totally and permanently disabled. The district court used the word "manifest" or some variant thereof eight times throughout its opinion, including when it purported to quote the terms of the Plan.[99] The district court's decision is plainly rooted in a fundamental confusion about the Plan's standard for total and permanent disability benefits.

The district court also characterized the "diffuse axonal injury" seen in a June 2010 MRI as "a devastating traumatic brain injury."[100] There is no evidence anywhere in the record—none whatsoever—establishing that this "diffuse axonal injury" observed on an MRI caused "a devastating traumatic brain injury" in Solomon, or anything close to it. The district court reached beyond the record and borrowed this characterization from Solomon's attorney, who paraphrased a description pulled from a plaintiffs' firm website.[101] The same website states that

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[98] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 22-23 (JA088-089).

[99] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 4 (JA070).

[100] 3/4/2016 Mem. & Order re: Motions for Sum. Jgmt. at 22 (JA088).

[101] *See Diffuse Axonal Injury*, Newsome Melton Law Firm, http://www.brainandspinalcord.org/diffuse-axonal-injury/ (last visited Nov. 2, 2016).

diffuse axonal injury "can also occur in moderate and mild brain injury," not just devastating cases. Another website not cited by the district court or Solomon's attorney explains that with diffuse axonal injury, "[d]epending on the severity and distribution of injury," "patients can vary from minimally affected to being in a persistent vegetative state."[102] In fairness, it is impossible to attribute any significance to the June 2010 MRI findings, much less that Solomon was totally and permanently disabled at that time, which was still three months after the March 31, 2010 Football Degenerative cut-off.

The Board unquestionably has discretionary authority to weigh and resolve conflicting evidence. That authority should not be undone so casually by "evidence" and conclusions found nowhere in the administrative record.

CONCLUSION

The district court cast aside the Board's decision in favor of its interpretation of the Plan and its preferred view of the evidence. That was wrong.

Appellants ask this Court to vindicate the rule that a plan administrator may be vested with discretionary authority and, if so, any reasonable decision issued by that administrator will stand. That is the essence of the abuse-of-discretion standard of review that controls this ERISA case. If it is faithfully applied, the

[102] Dr. Henry Knipe and A. Prof Frank Gaillard et al., *Diffuse axonal injury*, RADIOPAEDIA.ORG, https://radiopaedia.org/articles/diffuse-axonal-injury (Nov. 2, 2016).

district court's decision must be reversed. The Board reasonably interpreted the terms of the Plan, and it reasonably concluded that the record as a whole did not show that Solomon had become totally and permanently disabled prior to March 31, 2010.

The Court should reverse the decision of the district court and render judgment for Appellants.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants respectfully submit that this case may be appropriate for oral argument in light of the breadth of the administrative record and the complexity of the arguments raised by the parties. For these reasons, Appellants believe that oral argument could assist the Court in resolving these issues.

/s/ Michael L. Junk
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Dated: November 2, 2016

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16-1730 **Caption:** Jesse Solomon v. Bert Bell/Pete Rozelle NFL Player Retirement Plan

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(s) /s/ Michael L. Junk, Esq.

Attorney for Appellants

Dated: November 2, 2016

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I certify that on November 3, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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November 2, 2016
Date

ADDENDUM A

COLLECTIVE BARGAINING AGREEMENT

August 4, 2011

NFL PLAYERS ASSOCIATION

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ARTICLE 1
DEFINITIONS

As used in this Agreement, the following terms shall have the following meanings unless expressly stated otherwise:

"Accrued Season" means any playing season for which a player received credit with respect to his qualifications for Unrestricted Free Agency or Restricted Free Agency.

"Agreement" means this Collective Bargaining Agreement.

"All Revenues" or "AR" means all of the League and Team revenues that are included within the definition of All Revenues, as set forth in Article 12.

"Benefits" or "Player Benefit Costs" means the aggregate for a League Year of all sums paid (or to be paid on a proper accrual basis for a League Year) by the NFL and all NFL Teams for, to, or on behalf of present or former NFL players as specified in Article 12.

"Club" or "Team" or "Member," used interchangeably herein, means any entity that is a member of the NFL or operates a franchise in the NFL at any time during the term of this Agreement.

"Club Affiliate" or "Team Affiliate" means any entity or person owned by (wholly or partly), controlled by, affiliated with, or related to a Club or any owner of a Club.

"Commissioner" means the Commissioner of the NFL.

"Compensatory Draft Selection" means an additional Draft choice awarded to a Club in any Draft as described in Article 9 and Article 10.

"Discount rate" means a discount rate calculated using interest on an annual compounded basis using the one-year Treasury yields at constant maturities rate as published in The Wall Street Journal on February 1 (or the next date published) of the League Year in which the amount to be discounted accrues, is awarded, or occurs, as the case may be. If this rate is not published in The Wall Street Journal for any reason, then the website of the Federal Reserve (http://www.federalreserve.gov) shall be used to obtain the interest rate.

"Draft" or "College Draft" means the NFL's annual draft of Rookie football players as described in Article 6. "Supplemental Draft" means the supplemental draft in a given League Year, if held by the League.

"Draft Choice Compensation" means the right of any Club, as described in Article 9 and Article 10, to receive draft pick(s) from any other Club.

"Drafted Rookie" means a person who is selected in the current League Year's Draft or whose Draft rights are held, or continue to be held, consistent with this Agreement, by an NFL Club that selected the Rookie in a prior Draft.

"Exclusive Rights Player" means a player with less than three Accrued Seasons whose contract has expired but who has received the Required Tender described in Article 8.

"Final League Year" means the League Year which is scheduled prior to its commencement to be the final League Year of this Agreement. As of the date hereof, the Final League Year is the 2020 League Year.

"Free Agent" means a player who is not under contract and is free to negotiate and sign a Player Contract with any NFL Club, without Draft Choice Compensation or any Right of First Refusal.

"Guaranteed League-Wide Cash Spending" means the amount of cash spending guaranteed as a percentage of the Salary Cap as set forth in Article 12.

"Interest" means interest calculated at an annual compounded basis using the one-year Treasury yields at constant maturities rate as published in The Wall Street Journal on February 1 (or the next date published) of the League Year in which the amount to receive interest accrues, is awarded, or occurs as the case may be. If this rate is not published in The Wall Street Journal for any reason, then the website of the Federal Reserve (http://www.federalreserve.gov) shall be used to obtain the interest rate.

"League-Wide Cash Spending" means the aggregate amount of cash spent or committed to be spent by NFL Clubs on players in a League Year, calculated as set forth in Article 12.

"League Year" means the period from March [__] of one year through and including March [__] of the following year, or such other one year period to which the NFL and the NFLPA may agree.

"Minimum Salary" means the minimum annual Paragraph 5 Salary that can be contracted to be paid to an NFL player not on any Active list, and not on the Inactive list, pursuant to this Agreement.

"Minimum Active/Inactive List Salary" means the minimum annual Paragraph 5 Salary that can be contracted to be paid to an NFL player on any Active list, or on the Inactive list, pursuant to this Agreement.

"Negotiate" means, with respect to a player or his representatives on the one hand, and an NFL Club or its representatives on the other hand, to engage in any written or oral communication relating to efforts to reach agreement on employment and/or terms of employment between such player and such Club.

"New Club" means any Club except the Prior Club (as defined below).

"NFL" means the National Football League, including the NFL Management Council.

"NFL Player Contract" or "Player Contract" means a written agreement using the form attached as Appendix A with any addendum as permissible under Article 4 between a person and an NFL Club pursuant to which such person is employed by such Club as a professional football player.

"NFL Rules" means the Constitution and Bylaws, rules and regulations of the NFL and/or the Management Council.

"Paragraph 5 Salary" means the compensation set forth in Paragraph 5 of the NFL Player Contract, or in any amendments thereto.

"Player Affiliate" means any entity or person owned by (wholly or partly), controlled by, affiliated with, or related to a player.

"Player Cost Amount" means the amount calculated pursuant to the rules set forth in Article 12.

"Practice Squad" means the Practice Squad as described in Article 33. "Practice Squad player" means a player on the Practice Squad.

"Practice Squad Player Contract" or "Practice Squad Contract" means a written agreement between a person and an NFL Club pursuant to which such person is employed by such Club as a Practice Squad player. For purposes of this Agreement, all references to Paragraph 4, 5, 9 or 10 of the NFL Player Contract shall be deemed, where applicable to a Practice Squad Player Contract, to be references to Paragraph 3, 4, 7 or 8, respectively, of the Practice Squad Player Contract.

"Preexisting Contract" means an NFL Player Contract (including any renegotiation or extension) executed before March 12, 2011.

"Prior Agreement" means the Collective Bargaining Agreement in effect during the 2006–10 League Years, as amended.

"Prior Club" means the Club that contracted with or otherwise held the NFL playing rights for the player for the previous League Year.

"Projected AR" means the amount of AR projected in accordance with the rules set forth in Article 12.

"Projected Benefits" means the amount of Benefits projected in accordance with the rules set forth in Article 12.

"Qualifying Offer" means the Required Tender for a Restricted Free Agent, as set forth in Article 9.

"Renegotiate" or "renegotiation" means any change in Salary or the terms under which such Salary is earned or paid, or any change regarding the Club's right to trade the player, during the term of a Player Contract.

"Required Tender" or "Tender" means a Player Contract tender that a Club is required to make to a player pursuant to this Agreement, either as a matter of right with respect to the player, or to receive Rights of First Refusal, Draft Choice Compensation and/or other rights with respect to the player, as specified in this Agreement.

"Restricted Free Agent" means a Veteran who has three Accrued Seasons and who completes performance of his Player Contract, but who is still subject to a Right of First Refusal and/or Draft Choice Compensation in favor of his Prior Club.

"Right of First Refusal" means the right of an NFL Club, as described in Article 9 and Article 10, to retain the services of certain Veteran players by matching offers made to those players.

"Rookie" means a person who has never before signed a Player Contract with an NFL Club. The first Player Contract signed by such person is a "Rookie Contract."

"Room" means the extent to which a Team's then-current Team Salary is less than the Salary Cap (as described in Article 13), and/or the extent to which a Team's Rookie Salary is less than the Year-One Rookie Allocation (as described in Article 7).

"Salary" means any compensation of money, property, investments, loans, or anything else of value that a Club pays to, or is obligated to pay to, a player or Player Affiliate, or is paid to a third party at the request of and for the benefit of a player or Player Affiliate, during a League Year, as calculated in accordance with the rules set forth in Article 13.

"Salary Cap" means the absolute maximum amount of Salary that each Club may pay or be obligated to pay or provide to players or Player Affiliates, or may pay or be obligated to pay to third parties at the request of and for the benefit of Players or Player

Affiliates, at any time during a particular League Year, in accordance with the rules set forth in Article 13.

"Settlement Agreement" means the agreement dated July 25, 2011 resolving, subject to the fulfillment of certain conditions, the lawsuit styled *Brady v. NFL*.

"System Arbitrator" means the arbitrator authorized by this Agreement to hear and resolve specified disputes as provided in this Agreement.

"Team Salary" means the Team's aggregate Salary for Salary Cap purposes, as calculated in accordance with the rules set forth in Article 13.

"Undrafted Rookie" means a Rookie who was eligible for but not selected in a College Draft for which he was eligible (as further defined in Article 6, Section 11).

"Unrestricted Free Agent" means a Veteran with four or more Accrued Seasons, who has completed performance of his Player Contract, and who is no longer subject to any exclusive negotiating rights, Right of First Refusal, or Draft Choice Compensation in favor of his Prior Club.

"Veteran" means a player who has signed at least one Player Contract with an NFL Club.

each of the 2015–16 League Years; or 46% of Projected AR for each of the 2017–20 League Years.

(iv) **Floors.** If, in the 2012 or 2013 League Year, the Player Cost Amount calculated pursuant to this Section is less than $142.4 million per Club, then the Player Cost Amount shall be increased to $142.4 million per Club (i.e., there is a Player Cost "floor" of $142.4 million per Club for those League Years).

(v) **Salary Cap.** The Salary Cap for a League Year shall be the Player Cost Amount for that League Year less Projected Benefits for that League Year, divided by the number of Clubs in the League in that League Year, adjusted by any applicable True Up, provided further that there shall be no True-Up related to the 2011 League Year, and there shall be no "negative" True Up related to either the 2012 or 2013 League Year.

Section 7. **Guaranteed Player Cost Percentage:**

(a) In each League Year, the average of the current League Year's Player Cost Amount expressed as a percentage of AR and all prior League Year Player Cost Amounts expressed as a percentage of AR for each such prior League Year (the "Overall Average") must be at least 47% (the "Guaranteed Player Cost Percentage"). For purposes of this calculation, the percentages for each League Year other than the 2011 League Year shall be calculated as the Player Cost Amount calculated pursuant to the Final Special Purpose Letter for such League Year divided by AR for that League Year as determined in such Final Special Purpose Letter, and for the 2011 League Year the percentage shall be $4,556,800,000 (i.e., $142.4 million per Club) divided by AR for the 2011 League Year as determined by the Final Special Purpose Letter for the 2012 League Year.

(b) In the event that, at the end of a given League Year, the Overall Average is less than the Guaranteed Player Cost Percentage, there shall be an "Adjustment." The Adjustment shall consist of additional Room under the next Salary Cap to be set (in the form of a pro rata credit to Team Salary for each Club) in an aggregate amount equal to the amount that would have to be added to the Player Cost Amount for such given League Year so that the Overall Average would equal the Guaranteed Cost Percentage. The Player Cost Amount for such League Year shall be deemed to be increased by the Adjustment for purposes of the Guaranteed Player Cost Percentage calculation for subsequent League Years.

(c) In the event that an Adjustment is made under Subsection (b), then, if at the conclusion of any subsequent League Year the Overall Average is greater than the Guaranteed Player Cost Percentage, there shall be a "Recapture." The "Recapture" shall consist of a reduction in Room under the next Salary Cap to be set (in the form of a pro rata "charge" to Team Salary for each Club) in an aggregate amount equal to the amount that would have to be subtracted from the Player Cost Amount for such subsequent League Year so that the Overall Average would equal the Guaranteed Cost Percentage, provided that the dollar amount of the Recapture may not exceed the dollar amount of any prior Adjustments that have not previously been offset by a Recapture. (For example, if prior Adjustments resulted in $10 million of additional Room, a Recapture could not exceed $10 million in Room.) The Player Cost Amount for such League Year shall